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IN THE

Supreme Court of the United States

October Term, 1960.

No. 50.

EASTERN RAILROAD PRESIDENTS CONFERENCE, et al.,
Petitioners,

v.

NOERR MOTOR FREIGHT, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Third Circuit.

BRIEF FOR THE PETITIONERS.

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9 The Works of Thomas Jefferson (Ford ed. 1905), p. 128	28

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The judgment of the Court of Appeals was entered on December 10, 1959 (R. 236). The petition for a writ of certiorari was filed March 3, 1960, and was granted April 18, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

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QUESTIONS PRESENTED.

1. Whether the courts below correctly held that petitioners violated the Sherman Act by engaging in a public relations campaign that sought public support for or opposition to state legislation affecting the competitive position of respondents' industry and that, according to the courts below, sought to injure "the good will of the long-haul trucking industry".

2. Whether under the Sherman Act an injunction may be issued which, among other things, enjoins a group of railroads and their officers and employees (1) from sponsoring, instigating, or supporting the enactment of legislation imposing weight, size, or other limitations on trucks or levying taxes of any kind on long-haul truckers, (2) from engaging in public discussion of issues of public interest which may be found "to create resentment or hostility" to long-haul truckers "in the minds of the general public" or "in the minds of legislators, law enforcement officers, or other public officials, or members of any branch of government", and (3) from publishing "derogatory material" relating to long-haul truckers.

3. Whether a member of the trucking industry or a trade association of the trucking industry is "injured" in its individual "business or property", as those terms are used in the antitrust laws, by publicity concerning matters of public importance relating to that industry as a whole when the publicity did not refer to any particular member or its individual business relationships and, legislation aside, there was no evidence of loss to the business of any member as a result of the publicity.

STATUTES INVOLVED.

Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §§ 1 and 2, sections 4 and 16 of the Clayton Act, 38 Stat. 731, 737, 15 U. S. C. §§ 15 and 26, and the First Amendment of the Constitution of the United States are set forth in the Appendix to this brief, page 53.

STATEMENT OF THE CASE.

Petitioners, twenty-three eastern railroads, an association of their presidents (Eastern Railroad Presidents Conference, "ERPC"), and a public relations firm (Carl Byoir & Associates, "Byoir") were sued under the Sherman Act by some forty long-haul trucking companies and a trade association (Pennsylvania Motor Truck Association, "PMTA"). The complaint, filed in January 1953, alleged that the petitioners had combined and conspired to restrain and to monopolize the transportation of freight in violation of Sections 1 and 2 of the statute. A jury trial having been waived by all parties, the issues of law and fact were decided by the District Court. The proof adduced at the trial predicated liability upon the activities of the petitioners in disseminating statements which sought to convince the public and, through the public, the legislatures of the several states that state taxes on long-haul trucks should be increased and that maximum weight limitations on trucks should be lowered or, in any event, maintained and enforced.

The judgment affirmed by the Court of Appeals awarded nominal damages (6 cents trebled) to each of the individual trucking companies and gave substantial money damages to PMTA based on expenses which it had incurred in its own publicity campaign in support of its legislative program adverse to the interests of the railroads. The judgment also contained sweeping injunctive provisions which, among other things, enjoined the petitioners from jointly supporting legislation which would impose taxes of any kind upon long-haul truckers or limit the size and weight of their trucks, and from jointly engaging in any public discussion which is "derogatory of" the truckers, or which might create "resentment or hostility" toward them in the minds of the general public, shippers, or public officials.

A. The Economic and Political Background of the Controversy.

Since the 1930's and throughout the period covered by the complaint the growth of the long-haul trucking industry, largely at the expense of the railroads, has been phenomenal by any standard. In the period following World War II there was an even greater contrast between the sharp decline of the railroads' business and the spectacular rise of the truckers'. (¶¶ 9-11[1], R. 263b; ¶ 10c, R. 297b; ¶¶ 15c, 17c, R. 299b; ¶ 20c, R. 300b.) By 1949 it had become clear to petitioners that this diversion of traffic had occurred because basic components in the cost of truck service were being controlled not by free economic forces but by what the state legislatures could be persuaded to grant or withhold.

In seeking to obtain legislation that would enable them to take business from the railroads, the truckers had banded together to conduct public relations campaigns which had largely achieved two goals: first, obtaining legislative permission to use ever-larger and ever-heavier trucks carrying greater payloads; and, second, preventing higher truck fees and taxes so that the cost of building and maintaining highways used by inter-city trucks would continue to be defrayed principally from general tax revenues rather than from funds provided by the truckers (R. 44-45; ¶ 30, R. 269b; ¶ 41c, R. 305b). In contrast, the railroads were obliged to continue, with their own funds, to provide and maintain their own tracks and rights of way.

Since the truckers' competitive cost advantage had been legislatively created it could be mitigated only by action of the legislatures. In this setting, petitioners decided to encourage public opposition to state legislation which would increase maximum allowable truck weights, public support for enforcement of existing state laws restricting truck weights, and public support for legislation increasing

1. References to "¶" are to Findings of Fact made by the District Court.

taxes on long-haul trucking operations and restricting the weight of trucks.

B. The Nature of Petitioners' Activities.

It was against this background that the railroad petitioners in 1949 retained Byoir to undertake a public relations program which would acquaint the public with the arguments in support of the railroads' point of view on these legislative issues. The basic arguments were:

(1) that heavy trucks damage existing highways and cause highway hazards and congestion; and

(2) that the trucking industry does not pay its fair share of the cost of maintaining and building roads to accommodate increasingly heavy vehicles.

In publicizing these arguments Byoir used methods frequently employed in public relations campaigns directed to legislation. In states where they were active petitioners sought out other persons and organizations who were willing to ally themselves with the railroads. For example, in opposing legislation in Pennsylvania that would increase truck weights, Byoir worked with groups of farmers, municipal officials, and motorists, who had been longstanding opponents of increased truck weights (¶ 35, R. 270b; ¶¶ 37, 39, R. 272b; R. 62b-83b, 125b).

Petitioners supplied information to such allied groups and individuals, assisted them in the preparation and distribution of press releases, speeches, pamphlets, and articles (see, e.g., ¶ 39, R. 272b; P-30 to P-33, R. 380b-385b; P-73, R. 441b; P-291, R. 522b; P-66 to P-71, R. 396b-440b, 550b-556b; P-80, R. 444b; P-83 to P-87, R. 448b-472b), and sometimes furnished other technical and financial help as well. Petitioners also assisted in the publicizing of official and unofficial studies dealing with the highway problem (see, e.g., P-39 to P-42, R. 386b-391b, 546b) and distributed to the newspapers photographic mats which focused attention on the highway problem (P-149 to P-153, R. 559b-561b). They paid for and publicized public opinion polls (P-94,

R. 478b) and retained a research organization to make a statistical study of the comparative tax rates of various industries, including the trucking and railroad industries, and to publicize the results of its study (P-105, R. 482b).

In many cases the publicity material disseminated did not disclose that it had been originated, prepared, and distributed by or on behalf of petitioners. In some instances the petitioners formed and sponsored organizations which disseminated information and arguments in support of petitioners' position with respect to taxes and weight restrictions on truck operations without disclosing petitioners' relationship to the organizations.

Many of the same practices were followed by respondents, who likewise employed the so-called "third-party technique" in the anti-railroad campaigns in which they were vigorously engaged throughout the period to which this litigation relates (see Chief Judge Biggs' dissenting opinion, R. 219-220; R. 91-92, 115; ¶¶ 83c-87c, 89c-94c, 96c-102c, 104c, 106c-126c, 142c-159c at R. 320b-331b and R. 335b-340b).

The publicity material disseminated by petitioners was not directed, by name or otherwise, at any individual trucker, and respondents made no attempt to prove that it contained statements of fact that were false.[2] It dealt only with the following subjects:

> (1) support for or opposition to specific legislative bills dealing with truck weights or taxes under consideration in various states;[3]

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2. At the trial respondents' attack on the publicity was essentially directed to the use of the so-called "third-party technique". When petitioners offered to prove that the facts were as they had stated, the trial court rejected their offer (R. 155-156).

All the publicity material in the preparation or dissemination of which petitioners might be said to have played any part whatever, with the exception of certain voluminous technical treatises and motion picture films (P-271, D-3, D-10, D-69, D-70 to D-73), has been reproduced in Volumes II and III of the transcript of record.

3. P-57, R. 549b; P-69, R. 553b; P-112, R. 485b; P-118, R. 487b; P-119, R. 488b; P-129, R. 557b; P-130, R. 558b; P-235, R. 510b; P-273, R. 513b; P-274, R. 514b; P-283, R. 516b; D-5, R. 596b; D-6, R. 601b; D-7, R. 525b; D-51, R. 669b; D-57, R. 530b.

(2) the relationship between highway maintenance and construction costs and the increased use of heavy trucks;[4]

(3) the need for and sources of highway funds and the apportionment of taxes among highway users, including the argument that heavy trucks do not pay their fair share of highway costs;[5]

(4) the effect of heavy trucks upon existing highways, the prevalence of and reasons for truck overloading, and the enforcement of truck-weight statutes;[6] and

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4. P-12, R. 537b; P-31, R. 381b; P-33, R. 384b; P-42, R. 546b; P-49, R-548b; P-66, R. 396b; P-67, R. 410b-439b; P-68, R. 550b; P-70, R. 556b; P-81, R. 446b; P-83, R. 448b; P-85, R. 452b; P-88, R. 473b; P-94, R. 478b; P-126, R. 489b; P-129, R. 557b; P-171, R. 564b; P-172, R. 566b; P-173, R. 573b; P-185, R. 579b; P-200, R. 582b; P-203, R. 587b; P-254, R. 594b; P-271; P-291, R. 522b; P-293, R. 523b; P-295B, R. 595b; D-10; D-39, R. 613b; D-41, R. 623b; D-42, R. 628b; D-44, R. 630b; D-45, R. 636b; D-46, R. 638b; D-47, R. 644b; D-48, R. 667b; D-55, R. 670b.

5. P-12, R. 537b; P-13, R. 545b; P-16G, R. 379b; P-31, R. 381b; P-33, R. 384b; P-39, R. 386b; P-40, R. 388b; P-41, R. 390b; P-42, R. 546b; P-49, R. 548b; P-64, R. 392b; P-66, R. 396b; P-67, R. 410b; P-68, R. 550b; P-69, R. 553b; P-70, R. 556b; P-71, R. 440b; P-73, R. 441b; P-79, R. 442b; P-80, R. 444b; P-81, R. 446b; P-83, R. 448b; P-84, R. 450b; P-85, R. 452b; P-86, R. 461b; P-87, R. 471b; P-88, R. 473b; P-89, R. 476b; P-94, R. 478b; P-103, R. 481b; P-105, R. 482b; P-112, R. 485b; P-118, R. 487b; P-171, R. 564b; P-172, R. 566b; P-173, R. 573b; P-185, R. 579b; P-194, R. 581b; P-200, R. 582b; P-203, R. 587b; P-250, R. 590b; P-254, R. 594b; P-271; P-273, R. 513b; P-274, R. 514b; P-291, R. 522b; P-293, R. 523b; P-295B, R. 595b; D-3; D-10; D-42, R. 628b; D-44, R. 630b; D-45, R. 636b; D-46, R. 638b; D-47, R. 644b; D-48, R. 667b; D-51, R. 669b; D-55, R. 670b; D-56, R. 671b; D-57, R. 530b; D-60, R. 672b; D-62, R. 531b; D-63, R. 533b.

6. P-12, R. 537b; P-30, R. 380b; P-31, R. 381b; P-33, R. 384b; P-49, R. 548b; P-57, R. 549b; P-66, R. 396b; P-67, R. 410b-439b; P-68, R. 550b; P-69, R. 553b; P-81, R. 446b; P-85, R. 452b; P-94, R. 478b; P-118, R. 487b; P-119, R. 488b; P-129, R. 557b; P-130, R. 558b; P-149, R. 559b; P-150, R. 559b; P-151, R. 560b; P-152, R. 560b; P-168, R. 507b; P-170, R. 562b; P-171, R. 564b; P-172,

(5) highway dangers and congestion contributed to by heavy trucks.[7]

In its discussion of petitioners' publicity material the District Court singled out a number of items for special comment, apparently because it regarded them as illustrative. These examples show, better than any general description or classification, the nature and content of petitioners' publicity material:

(a) A speech, and press releases concerning it, delivered before service and civic clubs in New Jersey, which discussed the damage inflicted on New Jersey highways by large out-of-state trucks, the cost of such damage not borne by those who caused it, and tax measures recommended to correct the situation (P-66, R. 396b, and P-67, R. 410b-439b discussed at R. 52).

(b) An article in a farm magazine (said by the trial court to have "skillfully developed all the major points in the ERPC campaign"—R. 63-64) that sought to dramatize the effect of heavy trucks on public highways and called upon the farmer who was interested in roads to "demand that [his] state legislature pass effective legislation for limiting the weight of the big trucks, for enforcing the limitations, and for making them pay taxes toward the upkeep of the roads based on the weight they carry and the distance they travel" (P-173, R. 573b at R. 574 discussed at R. 63-64).

R. 566b; P-173, R. 573b; P-181, R. 575b; P-182, R. 577b; P-200, R. 582b; P-203, R. 587b; P-235, R. 510b; P-250, R. 590b; P-254, R. 594b; P-273, R. 513b; P-274, R. 514b; P-291, R. 522b; P-293, R. 523b; P-295B, R. 595b; D-9, R. 526b; D-10; D-43, R. 629b; D-44, R. 630b; D-45, R. 636b; D-46, R. 638b; D-48, R. 667b; D-51, R. 669b; D-55, R. 670b; D-56, R. 671b; D-57, R. 530b; D-62, R. 531b; D-63, R. 533b; D-69; D-70 to D-73.

7. P-66, R. 396b; P-67, R. 410b; P-129, R. 557b; P-130, R. 558b; P-153, R. 561b; P-170, R. 562b; P-171, R. 564b; P-172, R. 566b; P-181, R. 575b; P-182, R. 577b; P-254, R. 594b; P-273, R. 513b; D-8, R. 612b; D-40, R. 614b; D-46, R. 638b; D-51, R. 669b; D-56, R. 671b.

(c) A background research memorandum, which was furnished to the author of an article in *The Saturday Evening Post* that described the battle the Maryland state police were having with overloaded trucks (P-172, R. 566b discussed at R. 63).

(d) An article in *Country Gentleman*, which described the situation of the farmers who are handicapped by a lack of good all-weather roads and which discussed the sources of money for road improvement and encouraged farmers to seek additional aid for rural roads from their state legislatures (P-185, R. 579b). In describing a film based upon the article (P-271) the trial court found that "the lasting impact of the film is that big trucks do not pay their fair share of highway construction and maintenance" (R. 66; see also R. 64-65).

(e) Research material supplied to the late Senator Richard L. Neuberger for his article in *Harper's Magazine*, which dealt with problems of raising highway funds and of distributing highway costs among highway users, and which drew upon his own experience as an Oregon legislator in the adoption of a weight-distance tax on heavy trucks long before ERPC's retention of Byoir (D-44, R. 630b discussed at R. 66-67).

(f) Information, releases, and a film about a road test conducted by the Bureau of Public Roads under the direction of the Highway Research Board of the National Academy of Sciences (R. 67-76).

Other magazine articles, releases, resolutions, reports, letters, brochures, questionnaires, polls, and photographs were also the subject of comment in the District Court's opinion (R. 51, 54-57, 62-65, 85-87). All of them are included in the subject matter categories set forth at pages 6 to 8 above. All dealt with questions of highway safety, construction or finance.

None of this publicity suggested that the service to shippers provided by long-haul truckers was inadequate or unsatisfactory, that truckers' rates were unduly or unfairly high, or that it would be to the economic advantage of shippers to cease dealing with long-haul truckers. Nor was there any evidence that petitioners' publicity campaign caused any individual trucker, or the trucking industry as a whole, to lose customers.[8] Proof of injury to the truckers was confined to proof that certain of them would have made larger profits if the governor of Pennsylvania had not, in 1952, vetoed a bill, S. B. 615, which would have increased permissible truck weights.

C. The Decisions Below.

The trial court held that this publicity campaign violated the Sherman Act, basing the holding upon its conclusion that petitioners' intent was to restrain and to monopolize long-haul freight transportation and upon the petitioners' use of the "third-party technique". The court held that this intent and the use of this technique rendered the campaign unlawful even if the sole objective of the campaign and its sole effect on respondents was the passage of state legislation adverse to respondents' interests and the defeat of state legislation which would have furthered respondents' interests.[9] Even though there was no evidence

8. On the contrary, the District Court found that the business of the truckers had increased sharply in the eastern United States between 1946 and 1954, whereas railroad freight traffic had actually declined in the same area during the same period (¶ 17c, R. 299b).

9. In the words of the District Court:

> ". . . even if their [petitioners'] activities were found to be limited to attempts to obtain legislation or to seek the veto of S. B. 615, their conduct under the facts as found constituted illegal activity prohibited by the antitrust laws." (R. 127)

This misapprehension of the law was first voiced by the District Court in its opinion denying motions to dismiss the complaint. 113 F. Supp. 737, 742 (1953).

The like view of the majority of the Court of Appeals appears in its *per curiam* opinion at R. 217, in note 3.

of loss of business to the trucking industry generally or to any individual trucking company caused otherwise than by the veto of legislation sponsored by the trucking industry, the court nevertheless concluded that petitioners' activities were also intended to injure the "good will" of the trucking industry and that this objective was accomplished.

Each trucking company respondent had expressly stipulated that the only damages which it claimed were those resulting from the veto of Pennsylvania's Senate Bill 615 (R. 47b). Even though the District Court held that such damages are not legally compensable, it still awarded nominal damages to the trucker respondents. Further, it awarded to the trade association, PMTA, treble damages of $652,074 based, oddly enough, on expenses incurred by the association in conducting its own comparable public relations campaign, and a counsel fee. Finally, the court issued the injunction which is discussed in detail at pages 30 to 34 of this brief.[10]

Upon appeal by both sides,[11] Circuit Judges McLaughlin and Staley affirmed the decision of the District Court in a perfunctory *per curiam* opinion. Chief Judge Biggs, dissenting vigorously, described the result as "disastrous for it applies the Sherman Act to governmental restraints imposed by statutes enacted by state legislatures and to private activity in procuring such legislation" (R. 219).

10. The District Court also dismissed petitioners' counterclaim, which was based upon conduct of respondents similar to that which formed the basis of the respondents' complaint. See Chief Judge Biggs' dissenting opinion, R. 228, note 15.

11. The respondents appealed from the refusal of the District Court to award substantial damages to the individual trucking companies for the injury allegedly suffered because the governor of Pennsylvania vetoed legislation, S. B. 615, which would have increased the permissible gross weight of trucks.

SUMMARY OF ARGUMENT.

I.

The activity found by the courts below to have violated the Sherman Act was a public relations campaign. It did not involve any of the restrictive commercial practices to which the statute has traditionally been applied. Although there is dispute between the parties as to the purposes which motivated this campaign, there can be no dispute as to the content of the publicity which was disseminated. The content of this material consisted of the discussion of issues of public and legislative policy (truck weights, road damage, highway safety, cost and finance). It was not directed to the business relations between long-haul truckers and their customers and it had no capacity to interfere with those relationships.

The holding of the courts below that this campaign violated the Sherman Act in its legislative aspects and because those courts concluded that it also had extra-legislative purposes and effects is erroneous as a matter of law.

Restraints and monopolies imposed by valid governmental action are not within the reach of the Sherman Act. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 358; *Olsen v. Smith*, 195 U. S. 332, 344-345; *Parker v. Brown*, 317 U. S. 341, 351; *United States v. Rock Royal Co-op.*, 307 U. S. 533, 560. Accordingly, concerted efforts to encourage the imposition of such restraints and monopolies cannot give rise to liability in damages, or provide a basis for injunctive relief, under that statute. That the courts below ignored this rule is strikingly disclosed by the terms of the injunction issued by the District Court and affirmed by the Court of Appeals, which is largely directed to forbidding legislative activity.

The error of the holding of the courts below cannot be cured by reliance upon their conclusion that petitioners'

campaign was motivated not only by legislative objectives but was simultaneously intended to injure the good will of the long-haul trucking industry and thereby interfere with business relations between truckers and shippers.

This conclusion cannot change the fact that what petitioners did was to disseminate arguments on issues of public policy. The Sherman Act has never been applied to this kind of public discussion of issues of general importance. The activities to which the Sherman Act has historically been applied by this Court have all been commercial practices which restrain the free play of competitive economic forces either by limitations self-imposed by those engaged in the practices or by the exercise of coercive power directed against the commercial freedom of third persons. The debate and discussion of issues of public policy engaged in by petitioners are not of that character. Any effect which they might have is therefore not a restraint of trade within the meaning of the Sherman Act and since discussion of public issues is not the kind of activity covered by the Sherman Act petitioners' intent and the fact that they employed the so-called "third-party technique" are both irrelevant.

To construe the general terms of the Sherman Act as applying to the kind of public debate and discussion here involved would raise serious constitutional problems and would disregard this Court's rule that a statute will be given an allowable construction that fairly avoids a constitutional issue. The constitutional problems presented by the decision below are demonstrated by the terms of the injunction which the trial court issued as a necessary result of its holding that the statute had been violated by the conduct here at issue. The injunction severely restricts petitioners' rights to appeal to the public, legislators and other government officials, and to support or oppose legislation affecting their competitors. In general terms it also enjoins respondents from saying anything that might be deemed "derogatory" to long distance truckers or which might create "resentment" toward them "in the minds of the

general public". A construction of the Sherman Act which results in such an injunction clearly transcends constitutional limits. Since the substance of the injunction is the necessary result of an erroneous interpretation of the statute, the injunction cannot be cured by revision.

II.

For the reasons stated above the courts below erred in finding Sherman Act liability even if it is assumed that they correctly concluded that the public relations campaign was not entirely legislative in its purpose and effects. In fact those conclusions should be rejected because they are without any support in the record. There is a complete absence of any proof that the public relations campaign impaired or interfered with the relations between the long distance truckers and their customers. Indeed, respondents made no attempt to prove any such consequences. The conclusions are inconsistent with the particularized findings made by the District Court which show on their face that the campaign was solely legislative both in purpose and in consequences. The conclusions are in conflict with respondents' own explicit statement of the theory of their case and to reach them the trial court had to change drastically the substance of findings proposed by respondents themselves since those proposed findings recognized and accepted the absence of any extra-legislative purpose or effect.

III.

The decision below must be reversed for the further reason that the respondents failed to show the injury or threat of injury to "business or property" necessary to maintain a private cause of action under the Sherman Act. Injury caused or threatened by legislative action or inaction is not a basis for either damages or injunctive relief under the statute; respondents did not and could not prove any loss or threat of loss of business because of customer hos-

tility; and general public disapprobation of the trucking industry as a whole is not injury to "business or property".

The award of damages to PMTA was plainly improper for an additional reason. PMTA is a non-profit trade association not engaged in the trucking business or any other commercial activity, and thus has no "business or property" subject to injury. Nor can this award of damages be justified on any theory that PMTA could collect damages on behalf of a class of individual truckers. It is settled that under the antitrust laws a trade association has no standing to recover damages for injury to the "business or property" of its members but may recover damages only for injury to itself. *Farmers Co-op Oil Co. v. Socony-Vacuum Oil Co.*, 133 F. 2d 101 (8th Cir. 1942).

ARGUMENT.

I. The Sherman Act Does Not Apply to Petitioners' Activities in Disseminating Arguments and Information on Public Issues and to Construe the Statute as Applying to Those Activities Would Raise Serious Constitutional Questions.

It is not disputed that the activity which the courts below held to have violated the Sherman Act was a public relations campaign. There is no suggestion that petitioners collusively fixed prices; divided territories; cut prices to eliminate competition; organized boycotts; foreclosed markets by tying agreements, stock ownership, or other preemptive arrangements; or otherwise engaged in any of the activities which have traditionally been held to violate the antitrust laws. In short, if the petitioners violated the law in this case it was solely because of their activity in disseminating and publicizing, and causing others to disseminate and publicize, oral and written statements. In considering the legality of their conduct it is therefore necessary to begin by reference to the content of the statements which petitioners disseminated and publicized.

Although there is controversy between the parties as to the nature of petitioners' purpose in conducting the public relations campaign, there can be no controversy about the actual content of the statements disseminated by petitioners in the course of the campaign. The press releases, speeches, magazine articles, films, statistical computations and other writings and statements used in petitioners' campaign consisted solely of arguments for the enactment, preservation, and enforcement of state legislation limiting the weight and size of long-haul trucks, and for the raising of revenue for highway construction and maintenance by increased taxes on trucking operations. The content of

these arguments was in no sense directed to the relations between long-haul truckers and their customers. The arguments did not refer to any particular trucker. They did not disparage the efficiency or quality of the service provided by long-haul truckers or attack their rates as unreasonably high, and they had no capacity to interfere with the commercial relations existing between long-haul truckers and their customers.[12]

The courts below recognized that petitioners' public relations campaign was prompted by a desire to obtain legislative action. In fact, the injunctive relief granted by the District Court, which was found "justified" by the Court of Appeals (R. 218), was almost entirely directed to restricting and controlling the activities of the petitioners in

12. The opinion and the particularized findings of the District Court, to the extent that they deal specifically with the content of the publicity instead of merely characterizing the publicity in terms of its alleged purpose and effect, leave no doubt that the publicity related entirely to the desirability of taxes and weight limitations on long-haul trucking operations. For example, it appears from the District Court's description of petitioners' activities in the State of New Jersey that the speeches and press releases used in that state related to "legislative restrictions on the trucking industry" (R. 50); the District Court's discussion of the magazine articles said to have been inspired by petitioners or to which they contributed material makes it plain that these articles were directed only to such matters as the highway damage caused by heavy trucks and the advantages of weight-distance taxes on heavy trucks as a means for raising revenue for highway construction and maintenance (R. 62-67); the entire discussion in the District Court's opinion of the activities of petitioners in Pennsylvania shows that the content of petitioners' statements in that state consisted of arguments relating to issues raised by a legislative proposal to increase the weight limit on trucks and to the desirability of a weight-distance tax (R. 76-84); and even in the section of its opinion in which the District Court summarized the activities of petitioners believed to be relevant to the charge of "vilification" the court's discussion affirmatively discloses that the statements and arguments involved dealt only with such matters as highway congestion, highway damage, and similar problems created by heavy trucks (R. 84-87). The publicity material and the District Court's findings with respect to it are discussed in more detail at pages 6 to 10, *supra*, and 42 to 46, *infra*.

seeking action by legislatures and government officials and public support for such action. The courts below concluded, however, that petitioners' desire to obtain legislative action was accompanied by a purpose to injure the "good will" of the trucking industry and that in fact the campaign did injure that "good will" and interfered with relations existing between long-haul truckers and their customers. In reaching these conclusions the courts below did not find that petitioners' actions in carrying on the campaign could be divided or classified on the basis of legislative and non-legislative purposes. Rather, they held that the single campaign violated the Sherman Act both in its legislative aspects and because of the purposes and consequences that were asserted to be non-legislative in character.

This holding is erroneous as a matter of law for two reasons. Concerted efforts to bring about economic consequences by valid governmental action do not constitute a conspiracy in violation of the Sherman Act, because economic consequences so achieved are not covered by the statute. And the publicizing of arguments on issues of public policy does not violate the Sherman Act even though accompanied by a purpose to arouse "resentment" in the minds of the public, which includes the customers of the competing industry, and even though it has the effect of arousing such "resentment".

A. Concerted Efforts to Bring About Economic Consequences by Governmental Action Affecting a Competing Industry Do Not Violate the Antitrust Laws.

Economic consequences brought about by valid governmental action cannot give rise to liability under the Sherman Act. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 358; *Olsen v. Smith*, 195 U. S. 332, 344-345; *Parker v. Brown*, 317 U. S. 341, 351; *United States v. Rock Royal Co-op.*, 307 U. S. 533, 560; *Okefenokee Rural Elec-*

tric Membership Corp. v. Florida Power & Light Co., 214 F. 2d 413 (5th Cir. 1954). Both of the courts below refused to recognize or to apply this principle on the ground that even if petitioners' activities were entirely directed to legislative action they violated the antitrust laws because petitioners were prompted by an intent to injure their competitors and because they used improper means to induce governmental action. This reasoning ignores the premise of the doctrine applied in the cases cited above.[13] In the words of this Court in *American Banana Co. v. United Fruit Co.*, 213 U. S. at page 358, the fundamental reason for the rule "is that it is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper."[14] Because a restraint of trade imposed by valid governmental action does not violate the Sherman Act, it necessarily follows that action in concert to achieve such a restraint cannot be a conspiracy to restrain or to monopolize trade within the scope of the Sherman Act, irrespective of intent and of the character of the

13. The District Court properly held that respondents could recover no damages for injuries caused by governmental action and this holding was affirmed by the Court of Appeals. The courts held, however, that the activities of petitioners in inducing the action were a violation of the Sherman Act, and accordingly granted injunctive relief which in large measure is directed against legislative activity (R. 150-151). Thus the courts below erroneously held that conduct which could not give rise to a restraint under the statute for the purpose of damages was actionable for purposes of injunctive relief. See *Graves v. Cambria Steel Co.*, 298 Fed. 761, 762 (S. D. N. Y. 1924).

14. Both the District Court and the Court of Appeals took the view that this holding of the *American Banana* case has been modified or overruled by the later decisions in *United States v. Sisal Sales Corp.*, 274 U. S. 268, and *Steele v. Bulova Watch Co.*, 344 U. S. 280. However, it is plain from the opinions in these later cases that they bear only upon that aspect of *American Banana* that relates to the extra-territorial application of American law and do not touch the holding that economic consequences brought about by valid governmental action are not within the Sherman Act.

means used.[15] Thus, in *United States v. Rock Royal Co-op.*, 307 U. S. 533, where it was specifically alleged that an administrative order had been obtained pursuant to a conspiracy to achieve a monopoly and by fraudulent and unlawful means (see 307 U. S. at pages 556-558), this Court, speaking to those charges, said (307 U. S. at page 560):

> "If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give cooperatives a monopoly of the market would not violate the Sherman Act * * *."[16]

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15. In appropriate circumstances, if the governmental action has been induced by means which have duped or defrauded the governmental agencies involved, this may be ground for invalidating the governmental action. Compare *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U. S. 238. In this case no attack is made on the validity of the governmental action claimed to have been caused by petitioners' activities. Until sovereign action is annulled or set aside the economic consequences it produces can supply no basis for liability under the Sherman Act.

16. Disregard of this principle led the District Court to attempt to draw a wholly artificial distinction between the legislative efforts of petitioners and those of the long-haul truckers. Although both groups used the same methods the District Court held that the efforts of the truckers were lawful under the Sherman Act because the legislative benefits they sought were "affirmative" in the sense that they tended to benefit the truckers, whereas petitioners' efforts were "negative" because they were intended to burden or diminish the competitive power of the truckers (R. 115, 94). The asserted distinction is illusory. The bills sponsored in state legislatures by the truckers to increase weight limitations (which under the District Court's reasoning were prompted by "affirmative" motives) were admittedly designed to take business away from the railroads and thereby to inflict economic injury upon them (¶ 30, R. 269b; R. 127b-129b). Yet petitioners' opposition to those bills was characterized by the District Court as "negative" in purpose and hence unlawful. The definitive comment on this asserted distinction was made by Chief Judge Biggs in his dissenting opinion in the Court of Appeals: "The distinction attempted to be made by the court is too subtle for me to grasp. It seems to be based on the theory that under the Sherman Act what is one competitor's meat may be another competitor's poison." (R. 228-229, note 15)

B. Petitioners' Publicity Campaign Concerning Issues of Public Policy Did Not Violate the Sherman Act Regardless of Their Motives or Publicity Methods.

The fundamental error of the decisions below cannot be cured by reliance upon the conclusions that petitioners' public relations campaign was prompted in part by a purpose to injure the good will of the trucking industry through creating "resentment" among its customers and that it had the effect of injuring the customer relations of the trucking industry. As we shall show later, these conclusions should be rejected because they are inconsistent with the evidence and with the particularized findings that were made by the District Court. See pages 34 to 46, *infra*. But even if the validity of the conclusions is assumed *arguendo*, the courts below erroneously construed and applied the Sherman Act.

The assumed conclusions do not change the fact that what petitioners actually did was to disseminate and publicize, or cause others to disseminate and publicize, arguments on issues of public policy, specifically issues relating to weight limitations and taxes on truck operations. Nothing else was involved.

In the seventy years of its existence the Sherman Act has never been applied to activity of this kind. From the earliest days of the statute's history, see *Standard Oil Co. v. United States*, 221 U. S. 1, this Court has consistently applied the Sherman Act only to those commercial activities and practices which either directly or by analogy could be regarded as "comparable to restraints deemed illegal at common law"; namely "contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market". *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 497-498.

The courts have never held that every act which is detrimental to customer relations or which diminishes the

general popularity of a competing industry is a restraint or monopolization of trade. The practices which this Court has held to constitute violations of the statute have a common characteristic. They are all commercial practices which restrain the free play of competitive forces either by limitations self-imposed by those engaged in the practices or by the exercise of coercive power directed against the commercial freedom of third persons. The debate and discussion of issues of public policy engaged in by the petitioners in this case are not of that character. The public relations campaign did not involve any self-imposed competitive limitations or any exercise of economic power which could compel either respondents or their customers to any course of commercial conduct. The campaign caused respondents themselves to intensify their own campaign to present to the public, including their customers, their own arguments on the issues of legislative policy involved. If this debate affected the state of mind of any customers as members of the public, that effect was not a restraint or monopolization of trade but the result of a voluntary choice made by the customers between competing arguments.

The courts below held that because they had concluded that petitioners' activities were intended to injure the long-haul trucking industry it necessarily followed that those activities violated the Sherman Act. But the question of intent or purpose to injure competitors is not decisive as to Sherman Act liability. The statute is designed to punish and to prevent activities that restrain or monopolize trade or that have an inherent tendency to do so. If in fact activities result in restraint or monopolization or have an inherent tendency to do so, an intent to restrain or to monopolize is not even a necessary ingredient of the offense. *United States v. Griffith*, 334 U. S. 100, 105-107.[17] Innocent or even

17. In the case of an attempt to monopolize, in which a specific intent is a necessary ingredient of the offense, it is still necessary to show that the nature of the activity involved is such as to create a "dangerous probability" of the effects which the statute prohibits. See *Swift & Co. v. United States*, 196 U. S. 375, 396.

laudable motives will not save from the ban of the statute activity of a kind that inherently tends to restraint or monopolization. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150; *Fashion Originators' Guild v. F. T. C.*, 312 U. S. 457. Similarly, if the nature of the activity involved is such that it does not restrain or monopolize trade within the meaning of the statute, and has no inherent tendency to do so, then it is not unlawful even if prompted by an intent to injure competitors. If the rule were otherwise it would be unlawful for the members of an industry to engage in quite normal activities designed to obtain patronage at the expense of a competing industry as, for example, joint advertising.

In holding that petitioners' public relations campaign violated the Sherman Act the courts below relied heavily upon the ground that petitioners' use of the so-called "third-party technique" was contrary to public policy and illegal. This is not a basis on which antitrust liability can be predicated. Since petitioners' public relations campaign was not the kind of concerted activity that restrains or monopolizes trade or has any inherent tendency to do so, the fact that they used the so-called "third-party technique" as one of the means for carrying on the campaign is irrelevant. This is so even if it be assumed that for reasons unrelated to the Sherman Act this technique is illegal or against public policy. The Sherman Act provides its own standard for determining the legality of concerted action and that standard is exclusive. Concerted action that is otherwise permissible under the Sherman Act does not violate that statute merely because it involves means or methods that may be illegal under other standards that are extraneous to the Sherman Act and unrelated to its purposes. The Sherman Act does not apply to all kinds of wrongs or crimes that may affect interstate commerce. Trespass, the forcible seizure of property, homicide and other acts of violence are concededly unlawful but they are not in and of themselves a basis for antitrust liability, and this is so even if the

acts are done in concert and are intended to and do have economic consequences that are harmful to others. *Apex Hosiery Co. v. Leader*, 310 U. S. 469; *Hunt v. Crumboch*, 143 F. 2d 902, 904 (3d Cir. 1944), *aff'd*, 325 U. S. 821.

C. To Construe the Sherman Act as Applying to Petitioners' Public Relations Campaign Would Raise Serious Constitutional Questions.

The decision of the courts below that the Sherman Act applies to the dissemination of information and argument on issues of public policy raises serious constitutional questions and violates this Court's salutary canon that a statute will be given "an allowable construction that fairly avoids a constitutional issue". *United States v. C. I. O.*, 335 U. S. 106, 129 (concurring opinion); *N. A. A. C. P. v. Alabama*, 357 U. S. 449, 459.

The subject matter of all petitioners' publicity related to petitioners' support of or opposition to legislative measures. Thus the question is whether, consistent with the First Amendment, a statute framed in the broadest and most general terms and providing not merely compensation, but the penalty of treble damages and criminal liability, as well as injunctive relief, may be applied to conduct which is admittedly persuasion of the electorate because: (1) the conduct is joint, (2) one purpose and effect of the conduct is found to be to make the electorate, including shippers and potential shippers, think less of the trucking industry, and (3) the ideas and arguments presented are not identified as coming from the source which in fact inspired them.[18]

First, it is too clear to require extended argument that speech which would be constitutionally protected if engaged

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18. The fact that petitioners' publicity was inspired by a commercial motive makes no difference to its status under the First Amendment. See *Cammarano v. United States*, 358 U. S. 498, 514 (concurring opinion); *Smith v. California*, 361 U. S. 147, 150.

in by a single railroad does not lose that protection because it is disseminated by many members of the railroad industry. Joint action with respect to public affairs is a necessary part of a republican form of government and the right of assembly is cognate to that of free speech and petition. Furthermore, as the courts below conceded, a genuine motive of the campaign was persuasion of the electorate and through it the legislatures, and the First Amendment provides in terms that such acts of petition are constitutionally protected whether engaged in individually or as a member of a group. *DeJonge v. Oregon*, 299 U. S. 353, 364.

Second, it would be a severe encroachment upon the right freely to publish discussion and argument on matters of public concern to hold that if in purpose or effect that discussion causes economic injury to another the speaker is liable criminally and can be held answerable for a monetary penalty and bound by an injunction which subjects his future speech to the hazard of citation for contempt. "Every expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group of society." *Thornhill v Alabama*, 310 U. S. 88, 104. To subject the right freely and vigorously to express one's views on public issues to the hazard of a subsequent treble damage or criminal judgment based upon the speculation of a court or jury as to motives would render the right of little value. Compare *Tenney v. Brandhove*, 341 U. S. 367, 377.

An intent to advance the economic interests of one group to the detriment of a competing group inevitably exists in all inter-industry controversies: coal against oil and gas; domestic manufacturers against importers; public against private electric power; and in the competitive rivalry among various forms of transportation: railroads, barge lines, steamships, scheduled and non-scheduled airlines and motor carriers. This is the essence of competition. To suggest that public acceptance of the propositions advanced by petitioners' publicity results in a violation of the

Sherman Act because such acceptance results in economic benefits to petitioners and in economic detriment to a competing industry assumes a rule of law that has never before been applied in antitrust or other cases and one that would impose extraordinary restrictions upon political activity and public debate. Such a rule would be in clear derogation of the First Amendment philosophy that "speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies". *Dennis v. United States*, 341 U. S. 494, 503.[19]

Petitioners do not suggest that one businessman may say anything he wishes about another without being held accountable. The familiar torts of trade libel and commercial disparagement have a history antedating the adoption of the Constitution and have never been considered to run contrary to the guarantees of the First Amendment. Historically the law governing these torts has developed on the basis of certain specific elements, including such matters as the degree of specificity of the references made, their content, the motive which inspired them, and their truth or falsity. The Sherman Act, on the other hand, gives no clue as to whether truth is relevant to legality, the nature of the content of speech which can give rise to liability or any other factors upon which the constitutionality of a statute impinging on the sensitive area of speech might well depend. If the act is to be applied to speech critical of a competitive industry even when, as here, the elements of trade libel or commercial disparagement are not present, the courts, without any legislative guidance, will have to devise rules to

19. The courts below cited *Giboney v. Empire Storage Co.*, 336 U. S. 490, in support of the proposition that the purpose to injure respondents' business which they found to have motivated petitioners' campaign stripped petitioners' speech of constitutional protection. The *Giboney* case, however, which involved picketing intended to coerce an employer into committing an act unlawful under state law, is not in point because (1) it is settled doctrine that picketing, because of its coercive effects on the customers of the picketed establishment, is something more than speech, *Hughes v. Superior Court*, 339 U. S. 460, 464-465, and (2) defendants there were attempting to compel the commission of an illegal act.

avoid the serious First Amendment issues necessarily present. The very generality of the Sherman Act, although not rendering the statute fatally vague when applied to the commercial practices which have been its traditional concern, would throw grave doubt on the constitutional validity of its application in the area of political discussion, for "this court has intimated that stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser. *Winters v. New York*, 333 U. S. 507, 509-510, 517-518." *Smith v. California*, 361 U. S. 147, 151.

Finally, despite their own use of precisely the same publicity methods, respondents have insisted, and the courts below have held, that because of petitioners' use of the third-party technique no constitutional questions are raised by the application of the Sherman Act to petitioners' publicity campaign. The constitutional questions raised here cannot be avoided so simply. The courts' holding assumes that the Sherman Act may, consistent with the Constitution, be used to punish or otherwise to inhibit speech on issues of public policy merely because its authorship is anonymous, pseudonymous or otherwise concealed. Any such assumption is wholly unwarranted.

Anonymous and pseudonymous writings have long played an important and familiar part in political affairs for a variety of reasons. See *Talley v. California*, 362 U. S. 60, 64-65. Compare *N. A. A. C. P. v. Alabama*, 357 U. S. 449. Sometimes the purpose has been to escape reprisals. On other occasions, as in the present case, this practice has been followed in the belief that it would increase the probability that the arguments advanced would be considered on their merits instead of being met by diversionary *ad hominem* attacks upon the source which evade and confuse the real issues.[20]

20. Respondents' brief in opposition to the petition for certiorari argues that it is only in the case of oppressed minority groups that

This familiar approach to public persuasion in political and economic matters has impressive historical antecedents. The writers of the *Federalist Papers* employed the technique, see *Talley v. California*, 362 U. S. 60, 65, and so did Thomas Jefferson and Abraham Lincoln.[21] More recently, associations whose sponsors and supporters are undisclosed, and which have successfully resisted occasional legislative efforts to compel disclosure, have become commonplace on the American scene.[22]

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the First Amendment protects speech or writings whose source or authorship is not disclosed. This argument ignores the decisions of this Court in *United States v. Harriss*, 347 U. S. 612, and *Rumely v. United States*, 345 U. S. 41, discussed on the following page 29. It will hardly be suggested that the Committee for Constitutional Government (*Rumely*) or the National Farm Committee (*Harriss*) were organizations of oppressed minority groups whose members stood in fear of reprisal.

21. Thomas Jefferson used the third-party technique in causing the distribution of scores of pamphlets by an acquaintance who was enjoined to keep secret the fact that Jefferson was their source. 9 *The Works of Thomas Jefferson* (Ford ed. 1905), p. 128.

Lincoln, too, recognized the value of seemingly independent press support for the causes he espoused. He quietly acquired a German language newspaper in Springfield, Illinois, permitting the former owner to continue as editor and to appear as proprietor. However, Lincoln had the power to take over this property "any time the newspaper should fail to operate as a faithful Republican mouthpiece and organ." 2 Sandburg, *Abraham Lincoln: The Prairie-Years* (1926), p. 184.

22. For example, in addition to the Committee for Constitutional Government, there is no disclosure of the business sponsors of the Foundation for Economic Education, which publishes books of prominent scholars expressing a conservative point of view. *House Select Committee on Lobbying Activities, Hearings*, 81st Cong., 2d Sess., pt. VIII, 4, 5, 9, 12-20 (1950). Another group, backed by labor interests, which declares that it is a research group, uses the name Public Affairs Institute. *Id.*, pt. VII, 4, 23. The American Fair Trade League, founded in 1913, which was for many years active in support of legislation to permit resale price maintenance, deliberately emphasized that the legislation was sponsored by small independent retailers and concealed the fact that the League itself was controlled by manufacturing interests. See generally, *FTC Report on Resale Maintenance* (1945), esp. 43-45.

Recognition of the fact that any attempt to regulate the right to speak and to publish anonymously or pseudonymously through application of a statute of the breadth and generality of the Sherman Act would create severe constitutional questions is demonstrated in decisions of this Court which have very narrowly construed congressional efforts, through legislation or resolution, to investigate the identity of persons attempting to influence legislation.

In *United States v. Harriss*, 347 U. S. 612, this Court construed the Federal Regulation of Lobbying Act to require a "modicum of information" only from persons engaged in "buttonholing" congressmen through direct communication with them, although the act required registration of and reports from persons seeking "to influence directly or indirectly the passage or defeat of any legislation".[23]

Rumely v. United States, 345 U. S. 41, involved a congressional resolution authorizing investigation of "all lobbying activities intended to influence, encourage, promote or retard legislation". Noting expressly that its approach to construction of this language was dictated by an effort to avoid difficult First Amendment issues, this Court construed the resolution to authorize investigation not of "the influences that form public opinion" but only of representations made directly to the Congress.

Thus in *Harriss* and *Rumely* conflict with the First Amendment was avoided by construing congressional language as not extending to persons engaged in influencing public opinion even though the language on its face appeared to be directed toward the identity of persons participating in all phases of the legislative process. In contrast to the congressional language involved in those cases, here there is nothing in the language or in the history of the

23. In *National Assn. of Mfgrs. v. McGrath*, 103 F. Supp. 510 (D. D. C. 1952), enforcement of the same statute was enjoined because the three-judge District Court concluded that it violated the First and Fifth Amendments. This Court dismissed the Government's appeal as moot. 344 U. S. 804.

Sherman Act which suggests any intention on the part of Congress to touch the efforts of businessmen to influence popular opinion on questions of public concern. This is therefore an even stronger case than either *Harriss* or *Rumely* for rejection of an interpretation of a statute that would extend it into an area of constitutional doubt.

D. The Injunction Exposes the Fundamental Error of Applying the Sherman Act to This Case.

The error of the decision below is clearly revealed by consideration of the injunction issued by the trial court. If, as it must, the decree mirrors the acts of petitioners which were thought by the courts below to create antitrust liability (R. 350b), it demonstrates that liability was grounded on activities which were not only beyond the scope of the statute but which were entitled to protection under the First Amendment.

The decree, in sweeping terms, tells petitioners and their officers and employees that they may make no statement that might subsequently be determined to have created "resentment or hostility" toward the long-haul trucking industry "in the minds of the general public" [IV(A)(1), R. 165] or in the minds of "legislators, law enforcement officers or other public officials or members of any branch of Government" [IV(A)(3), R. 165]. Petitioners are enjoined from publishing not only material that is false, but also any material that might be deemed "defamatory or derogatory" of respondents or their business [IV(A)(4), R. 165]. Petitioners are specifically forbidden even to "support" legislation imposing taxes of any kind on truckers, or imposing weight, size or other limitations on the trucking industry [IV(A)(9), R. 166]. These prohibitions apply not only to such activities directed against respondents by name but also to "those generally directed against long-haul truckers as a group" [IV(B), R. 166]. Moreover, contrary to the statement made at page 4 of respondents' brief in opposition to the petition for cer-

tiorari, these prohibitions apply irrespective of whether petitioners employ the so-called "third-party technique".[24]

The injunction cannot be defended on the ground that it is properly designed to protect respondents' commercial relations with their shippers against concerted activities by petitioners which are illegal under the antitrust laws. The fact is that not one of the injunctive provisions discussed above mentions the commercial relations existing between truckers and their customers. These provisions are nothing less than sweeping prohibitions that are designed to restrain the railroads from attempting to influence the public generally and legislators and other government officials to take positions sympathetic to the railroad industry's goals. Under them petitioners will be largely disabled from participating in public debate on major economic and political issues. They will be precluded from arguing to the public or to legislatures that highway user charges are unfairly distributed or that the public is paying a hidden subsidy to the railroads' competitors. The trucking industry has been rendered free of criticism and the public and the legislatures are to be left with but one side of the story.

It is not only because of their constitutional defects that these provisions are plainly improper and unwarranted. They are directed to conduct the effect of which can be felt only through legislation or other governmental action. As we have shown, such conduct cannot give rise to Sherman Act liability. Accordingly these provisions of the

24. The only one of the provisions mentioned above which is in any way qualified by reference to the third-party technique is paragraph IV(A)(9). The part of that paragraph enjoining petitioners from opposing legislation repealing "existing taxes or truck limitations" is conditioned on use of the third-party technique. But even that paragraph flatly prohibits petitioners, without regard to the third-party technique, from "sponsoring, instigating or supporting any legislation for the enactment of ton-mile, weight-distance, highway or other taxes of any kind to be levied on plaintiffs or their business, or weight, size, or other truck limitations" (R. 166).

injunction must fall because they restrain activity which has no tendency or capacity to violate the statute.

The error of the District Court's interpretation and application of the Sherman Act is further demonstrated by the one provision in the judgment which purports to be directed to the issue of interference with the business relations between truckers and shippers. That provision [IV (A)(2), R. 165] enjoins petitioners generally from "seeking to create resentment or hostility to plaintiffs in the minds of those persons who utilize or may utilize the services of the plaintiffs' trucks and in such a manner as to interfere with business relations between shippers and plaintiffs". The District Court's erroneous conclusion that any joint activity which diminishes the general popularity of a competing industry violates the Sherman Act compelled it to draw this injunctive provision in terms which are so vague and broad as to be objectionable both under traditional principles of equity jurisdiction and under the Constitution. Having potential application far beyond the area of trade libel and commercial disparagement, it is the kind of provision which is "so vague as to put the whole conduct of defendant's business in peril of a summons for contempt". *Swift & Co. v. United States*, 196 U. S. 375, 396. Indeed, the inhibitory effect of an injunctive provision so general and indefinite in scope is too extreme to be constitutionally permissible in an area where this Court has properly insisted on an unusually high degree of precision because of the fundamental interests necessarily and intimately involved. Compare *Stromberg v. California*, 283 U. S. 359, 369; *Thornhill v. Alabama*, 310 U. S. 88, 97, 98; *Winters v. New York*, 333 U. S. 507, 509.

Any interpretation of the Sherman Act which results in an injunctive provision of this scope would render the act vulnerable to the same constitutional challenge which invalidated the statute authorizing a general injunction against the publication of a scandalous or defamatory newspaper as held in *Near v. Minnesota*, 283 U. S. 697.

And given the legal premise upon which the District Court acted the provision is incapable of reform since any narrower prohibition would be inconsistent with the basis upon which liability was predicated.

Paragraph IV(A) of the decree purports to limit the prohibitions of the injunction to publicity issued or to other acts done by any petitioner in combination and with the intent of restricting or limiting the growth or expansion of respondents' business (R. 164-165). These limitations in fact, however, do not really restrict the scope of the decree. The element of combination would be present in any instance where a railroad association acted as petitioners' spokesman, and in this as in many other industries it is ordinarily the industry association which publicizes industry positions and expresses the industry viewpoint on legislative and similar matters.[25] Similarly, the requirement of intent does not narrow the prohibitory portions of the decree. Any railroad industry statement critical of the trucking industry could readily be found to have been made with an intent to aggrandize the railroads at the expense of the trucking industry, and railroad advocacy of legislation believed by the railroads necessary to correct competitive inequities would inevitably be undertaken with the knowledge and intent that the further "expansion" of the long-haul trucking industry would be to some extent "limited" if the advocacy were successful. Indeed it was by precisely this kind of reasoning that the District Court reached its conclusion that petitioners' public relations campaign was intended to restrict or limit the growth or expansion of respondents' business.[26]

25. Even if the speech were not an industry program as here, the element of concert would be present whenever a single railroad used an advertising agency.

26. Nor is the sweep of the injunctive provisions that have been discussed above diminished or mitigated by the general provisions of Paragraph V of the final judgment (R. 166). That paragraph provides in part that the petitioners are not prohibited "from seeking legislative, administrative or other governmental benefits for them-

The grounds upon which the trial court found Sherman Act liability logically compelled that court to grant injunctive relief which restrains and restricts the debate and discussion of issues of public and political policy and which controls and regulates the exercise of the right to petition (R. 349b-350b). Such relief has never before been granted under the Sherman Act either to private plaintiffs or to the Government. It is relief which on its face transcends constitutional bounds. The significance of the injunctive provisions of the judgment below goes far beyond any question of error or abuse in the exercise of judicial discretion in framing relief. Those provisions are in themselves a telling demonstration that the courts below have applied the Sherman Act to conduct which it was never intended to reach.

II. Petitioners' Public Relations Campaign Was Directed Solely to Legislation and Did Not Interfere With Business Relations Between Truckers and Their Customers.

So far we have assumed *arguendo* the validity of the conclusions of the courts below that petitioners' public relations campaign was not entirely legislative in purpose but was also intended to, and did, injure respondents by creating "public resentment . . . in the minds of those who utilized the services of the trucks and in such manner as to interfere with business relations between shippers and truckers" (R. 216, 101).

These conclusions should be rejected because they find no support in the evidence and are in fact inconsistent with the particularized findings made by the District

selves, as distinguished from imposing burdens on plaintiffs". This language does not permit petitioners to engage in any of the activities which are enjoined by Paragraph IV. Any other reading of the language would make the judgment internally inconsistent. Similarly, the last sentence of Paragraph V, which merely permits petitioners to appear before legislative, administrative or other governmental bodies, does not limit or qualify the prohibitory effects of the language of Paragraph IV.

Court.[27] The undisputed evidence and the specific statements made with respect to that evidence in the opinion of the District Court affirmatively establish that petitioners' public relations campaign was solely legislative in both purpose and effect.[28] It follows, as a matter of law, that petitioners' activities fall within the principle that concerted efforts to bring about economic consequences by governmental action do not violate the antitrust laws (see pages 18 to 20, *supra*).

The opinion of the District Court contains a detailed discussion of the organization and planning of petitioners' public relations program and of all the significant steps petitioners took in putting the program into effect. It plainly appears from this discussion that in fact the purpose of the program was solely to arouse the support of the public and through it the support of legislators and other public officials for legislative proposals which would mitigate what petitioners believed were unfair competitive advantages enjoyed by the long-haul truckers as a result of governmental action.

The District Court's discussion of the origin and planning of the public relations program is contained in

27. This Court's review of these conclusions is not controlled by Rule 52 of the Federal Rules of Civil Procedure because the Court is not dealing with findings of fact but rather with general conclusions drawn from facts as to which there is no dispute (R. 61b). Compare *United States v. du Pont Co.*, 353 U. S. 586, 598, note 28; *United States v. Parke, Davis & Co.*, 362 U. S. 29, 44; *United States v. Felin & Co.*, 334 U. S. 624, 640; *A. & P. Tea Co. v. Supermarket Corp.*, 340 U. S. 147. However, if the conclusions of the District Court were to be regarded as "findings of fact" within the meaning of Rule 52 then they would be clearly erroneous because there is no support for them in the record and because they are inconsistent with the trial court's more specific findings. The exercise of this Court's undoubted power to review and reject erroneous determinations of fact would be particularly appropriate in this case because of the close connection between the determinations and the constitutional issues that are raised by the decisions below. See *United States v. Felin & Co.*, 334 U. S. 624; *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 404.

28. The cursory majority opinion of the Court of Appeals does not purport to discuss the evidence.

a section of its opinion headed "Railroad Activities" (R. 45). The discussion is based on contemporaneous documents produced from petitioners' files and offered in evidence by respondents. Both the text of these documents and the specific statements that the District Court makes about their content show that the public relations program was directed solely to legislation.

The District Court first refers to the fact that before the formulation of the program one of the respondent railroads was considering "a campaign for Federal and State taxes against users of highways, waterways, etc." (R. 46). The exhibit showing these considerations (P-144, R. 191b-197b) refers solely to legislative problems and states, in its concluding paragraphs, " . . . the final test is (a) Who can get the clear facts across to the governors and members of the legislatures? (b) Who can get the votes?" (R. 193b).

Similarly, the purely legislative thrust of petitioners' campaign is evident from the first proposals of the railroad committee which, as the District Court points out, was "the most active and most potent" and "determined on a plan of operation" (R. 47). That plan, set forth in the committee's report (P-199, R. 209b-213b), which the court next discusses, recognizes petitioners' problem in its opening paragraph:

> "The eastern railroads are deeply concerned with the diversion of heavy inter-city freight traffic to the highways. It is felt that this diversion is not justified by the comparative economy between rail and highway transportation but rather that it has resulted from public policy which levies all cost of railroad transportation on the companies which operate the railroads and in turn on the patrons of railroad service. On the other hand the cost of building and maintaining highways used by inter-city trucks is borne principally by tax-paying citizens rather than by the operators or patrons of the service." (R. 209b)

And the concluding page states the solution, which is to "effect the necessary legislation or taxation" (R. 213b).

The court then alludes to the fact that the railroad committee charged with directing the campaign interviewed several public relations firms for the purpose of selecting one to be in charge of the program (R. 47). All of the proposals submitted by these firms (P-3, R. 132b; P-198, R. 199b; D-25, R. 223b; D-26, R. 229b), as the District Court points out, dealt with a campaign of publicity aimed at the public generally (not shippers) "to create a demand for legislation penalizing the truckers either by limitation of size and weight or the imposition of user taxes" (R. 47). The court devotes special attention to the presentation made by Byoir, the public relations firm ultimately retained by the railroads, pointing out that it "laid great stress on the success of that firm in prior legislative campaigns" (R. 47-48). In fact, other than discussing its organization and costs, Byoir's presentation dealt only with its prior success in legislative campaigns. The reason for limiting the presentation to this single subject is given in the document itself, which plainly states that "since, as we understand it, legislative action is necessary to obtain the objectives sought, we are outlining part of our record in this field" (P-3, R. 133b).

That the "objectives sought" in petitioners' campaign were attainable only through "legislative action" was made clear by the next document to which the court refers, describing it as evidencing Byoir's understanding of the campaign's "objectives" (R. 48). That exhibit states (P-5, R. 139b):

> "The objectives of the campaign are clear. They are: to obtain the passage, first in the legislatures of the states of New York, New Jersey and Ohio, and later in the other states of the Conference, of tax measures which will allocate to the heavy trucking industry its fair share of highway construction and maintenance costs."

The District Court found that in the exhibit "the ultimate objective is shrewdly set forth as legislation affecting the truckers", but added that "the intermediate goals . . . also set forth" were "designed and aimed at injury to the truckers". The court clearly recognized, however, that the intermediate objectives were "designed to arouse the public generally of the need to obtain new methods of financing public highways" (R. 48), and the text of the exhibit itself shows that the "intermediate goals" were to arouse public opinion in support of legislative measures and that all of petitioners' activities were to be "directed toward the legislators so that they will act in accordance with the demands of the voters" (P-5, R. 140b). Nowhere in this memorandum detailing the methods, procedures, organization, costs, and objectives of the public relations campaign that Byoir was retained to carry out is there even mention of shippers, much less any suggestion that one objective was to alienate respondents' customers.

The last document referred to by the District Court in this section of its opinion is a Byoir memorandum explaining the program to the Byoir staff (R. 48-49; P-24, R. 162b). Devoted to public and legislative questions, and making no mention of relations between truckers and shippers, it describes the then topical interest in highway construction, damage, and finance, and the then current newspaper stories "calling for appropriate action by state governments" (R. 165b). As the District Court points out, this document shows that petitioners' publicity material was planned to dramatize "highways and heavy trucks in the following particulars:-(1) highway construction costs; (2) highway safety and the part trucks play in lack of safety on the highways; (3) highway damages by trucks; (4) state revenue and expenditures; (5) general taxation stories" (R. 48).[29]

29. Comparison of this document with the classification by subject matter of the publicity material offered in evidence (*supra*, pp. 6 to 8) readily discloses that, in carrying out their campaign, petitioners' publicity was in fact confined to the subjects contemplated when the campaign was initially explained, in P-24, to the Byoir staff.

Thus the very documents which were offered in evidence by the respondents to prove the inception of the campaign, as described by the District Court and as appears from their face, show that petitioners sought only legislation and public support for it.[30]

Similarly, there is no support whatsoever in the record for the lower courts' conclusion that petitioners' activities had the effect of impairing the relations existing between long-haul truckers and their customers. The respondents did not even attempt to prove that any individual trucking company was deprived of business because petitioners' activities impaired its relations with its customers. Nor did they attempt to prove that the long-haul trucking industry as a whole suffered any diminution in traffic, or that the growth of the industry was in any way retarded, during the period of time covered by the alleged conspiracy. Indeed, there is no evidence at all in this case that petitioners' activities produced any economic consequences whatsoever apart from certain speculative losses which individual trucking companies alleged that they had suffered as a direct result of the action of the governor of Pennsylvania in vetoing a bill to increase weight limitations.

The infirmity of the courts' conclusion does not depend upon arguments as to the weight of the evidence or as to whether there is a "scintilla" of evidence which might support it. There is simply no evidence to discuss because there is an absolute and complete lack of proof that the respondent trucking companies, individually or collectively, suffered any loss of business because of impairment of their relations with customers.

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30. The only other exhibit which might be said to outline the purposes of petitioners' program is P-29 (R. 170b), a "Primer for the Staff" of Byoir. It incorporates by reference the legislative objective spelled out in P-5 (R. 139b) and P-24 (R. 162b), both of which are discussed above, and furnishes background information concerning railroads, long-haul trucks, highways, highway damage and finance, and other data of use in the public relations problem of how "to educate the public" (R. 179b) in support of "relief legislation" (R. 178b).

The fact is that respondents tried their case in the District Court on the theory that petitioners' public relations campaign was solely legislative in both purpose and effect. The notion that the campaign was intended to and did impair the relations between long-haul truckers and their customers was an afterthought injected into the case by the District Court after the trial and in flat disregard of respondents' contentions and of the evidence.

In the course of depositions taken before trial respondents were interrogated as to the nature of the alleged injuries said to have been inflicted upon them by petitioners' public relations program. Respondent after respondent admitted that his business had been affected only by the legislative action that petitioners had sought. The answers of Noerr, president of PMTA and of respondent Noerr Motor Freight, Inc. (referred to in the opinion, R. 121), are illustrative. His only example of loss to his company was that it could have lowered its rates if state law had permitted it to carry more lading on each truck (R. 129b-131b). When Noerr was asked about losses resulting from the alleged disparagement he could not give even one event or act or occurrence showing that his business was impeded, nor did he testify to a decline in his volume of traffic or to any other fact from which loss of business could be inferred (R. 130b). The deposition testimony of officers of other respondents was substantially the same (R. 21b-46b).[31]

Consistent with the deposition testimony and their theory of the case, respondents themselves introduced in

31. Indeed, the taking of depositions inquiring into injury allegedly suffered by respondents because of petitioners' activities was finally terminated when respondents stipulated that "the only damages claimed by the plaintiffs (except plaintiff Pennsylvania Motor Truck Association) are those that each of them may have suffered because of its inability to carry more than the weight limits fixed by the laws of Pennsylvania prior to the change in the law in 1955" (R. 47b).

The depositions of truckers other than Noerr, included in the record, were not offered in evidence at the trial. They are referred to here only because of their bearing on respondents' own theory of their case.

evidence the planning documents, discussed above, which show on their face that the campaign was entirely legislative in purpose, and did not offer any proof whatever of injury to their relations with their customers. In argument during the trial and in their requests for findings of fact respondents repeatedly recognized, and indeed asserted, that petitioners' campaign was wholly legislative in its purpose and that their cause of action was based solely on the economic consequences produced by the enactment of legislation or by its defeat. Thus in respondents' brief in opposition to defendants' motion to dismiss under Rule 41(b) they adopted the opening statement of petitioners' counsel (page 6):

> "There can be no dispute that the ERPC program was designed to foster or maintain restrictive legislation against the trucking industry. As Mr. Price said: 'The entire purpose of this program was legislative, either maintenance of the status quo or a change in the way that I have described; . . . ' (N. T. 41)."

In the same brief (at page 5) and in their brief in support of requests for findings (at page 6), respondents stated that "The objective of the campaign was to effect legislation to harass the long-haul truckers . . ." In the former (at page 8), they asserted that 1951 and 1952 ". . . saw the principal accomplishments of the defendants' campaign, including enactment of the ton-mile tax in New York and the veto of SB-615 in Pennsylvania". In the latter (at page 2), they urged that ". . . the conspiracy was successful in obtaining or retaining legislation imposing restrictions on plaintiffs, including the veto of SB-615, and as a result plaintiffs were injured."

At the end of the trial, when all of the evidence was in and respondents were in a position to state definitively the theory of their case, they requested only one finding on the issue of the truckers' injury:

"As a result of the veto of SB-615, plaintiff trucking companies were injured." (Plaintiffs' Requested Finding 55, R. 34)

The District Court's conclusion that petitioners' activities were intended to impair the good will of the trucking industry by interfering with its relations with its customers was not based on any proposed finding of fact submitted by respondents. On the contrary, to reach this conclusion it was necessary for the District Court drastically to change the substance of findings proposed by the respondents and to insert into the proposed findings a concept that was not requested by the respondents and had no support in the record. In their Requested Finding 16 the respondents asked for a finding that the principal means used by petitioners to carry out their conspiracy was the third-party technique for "creating public opinion and thereby procuring legislation . . ." (R. 26). The District Court, by the deletion and addition of words, completely changed the sense of this requested finding by adding to it the notion that the petitioners' effort was to create public opinion "hostile to the trucking industry thereby destroying its good will" (R. 157).[32]

Respondents' recognition that petitioners' activities were solely legislative both in purpose and effect was compelled by the content of the material that petitioners publicized and disseminated. That material cannot reason-

32. The changes made by the District Court in Requested Finding 16 are shown below; the words inserted by the court are italicized and the words deleted have been struck through:

"16. The principal means used by defendants to carry out their conspiracy was the third person technique for creating public opinion ~~and thereby procuring~~ *hostile to the trucking industry thereby destroying its good will with the public and thereafter attempt to secure* legislation (a) imposing or retaining weight restrictions on trucks; and (b) subjecting trucks to ton mile, weight distance or similar taxes, in order to increase their costs of operation and to cause them to lose business (Brief pages 11-12)" (R. 26, 157).

ably be read as designed, or as likely, to discourage shippers from using the services of trucks. Arguments that long-haul truckers do not bear their fair share of the expense of constructing and maintaining highways in view of the economic advantages they derive from the use of the highways, that long-haul truckers have an unfair competitive advantage over the railroads in the nature of a subsidy, that this advantage is increased when existing regulations are not enforced, and that weight limitations and taxes are justified because heavy trucks damage the surface of the highways, injure bridges, and create traffic hazards and congestion are all arguments which by their very terms are addressed to legislative problems and to legislative action. They are not arguments that have any tendency, or indeed capacity, to deter shippers from dealing with the trucking industry. Because the arguments emphasize the competitive advantages which have been given to truckers by legislation it would be more realistic to expect them to cause shippers (who may be assumed to be alert to their own economic interests) to seek to share in these advantages by utilizing truck transportation. Had petitioners' goal been interference with the business relations between truckers and shippers they would hardly have selected means so peculiarly ill-adapted to that end.

The conclusion of the trial court that petitioners' campaign was not entirely legislative in purpose and effect is not only unsupported by the evidence and foreign to respondents' theory of their case but is also inconsistent with that court's own detailed description of what petitioners did in their publicity campaign. In the twenty-odd pages where it described, state-by-state, the activities and accomplishments of petitioners' campaign, the court, in deference to the facts, could not avoid describing them in legislative terms (R. 49-61, 76-84).

Thus, although the court characterized petitioners' publicity in New Jersey as designed "to stir up as much resentment against the trucking industry as was possible",

when it descended to specifics the court noted that the campaign was directed to "the lowering of truck weights and the increase in truck fees" and to the advocacy of a "weight-distance tax whereby users of New Jersey roads would be charged a mileage fee based upon weight and distance travelled on the highways of New Jersey" (R. 50); that the speeches and press releases involved were directed to "legislative restrictions on the trucking industry" (R. 50); that the campaign created a "clamor for a weight-distance tax" (R. 51); that the campaign was successful in its attempt "to arouse the people of New Jersey to strike out at the trucking industry through the method of weight limitations and higher fees" (R. 53); and that the "results of this campaign" were the reduction of "the maximum axle load . . . and a marked increase in truckers' fees" (R. 52).

Similarly, the court summarized what it called "the results of Byoir's work in New York" by adopting part of an ERPC report setting forth as the only significant New York event "The Mileage Tax Bill, which passed the New York legislature" (R. 58; P-231, R. 215b). And in Ohio, where it found that petitioners had "done such 'an efficient job of education' that there arose a public demand for taxation on heavy trucks" (R. 59), the trial court regarded "the rise in fees and the campaign for the weight-distance tax" as "two of the outstanding accomplishments of . . . the entire [railroad] campaign" (R. 60).

Turning to Pennsylvania, where respondents charged that petitioners' campaign "reached a climax" (Complaint, Paragraph 20, R. 8) and caused the only damages they claimed, the court recounted petitioners' activities in opposing S. B. 615 and in advocating a weight-distance tax on trucks. A Byoir internal report, referring to "Defeat of the 'Big Truck' Bill" as an "achievement", was said to have "summarized Byoir's accomplishments from Byoir's viewpoint in helping to bring about the ultimate veto of the bill" (R. 80). The entire Pennsylvania effort, as the court viewed it, was described in the following terms (R. 84):

"Having successfully repulsed the truckers in their efforts to clear Pennsylvania as a bridge state [i.e., veto of S. B. 615], for the next year and up until the institution of this suit the record is abundantly clear that Byoir worked hand-in-hand with Littlefield and with Reiter to promote the introduction and passage of a weight-distance tax. . . ."

And even in that portion of its discussion where the court presumably attempted to marshal all of the facts bearing on the alleged extra-legislative aspects of the campaign ("Campaign of Vilification"), the court summarizes the facts in a way that leaves no doubt that the ultimate objective of petitioners' public relations campaign was legislation:

"By the use of these various media of arousing public resentment, including newspapers, magazines, radio broadcasts and television, Byoir in the area of its operation built a strong base of public resentment. During this period they created so great public resentment against the trucks that it was then a relatively simple problem for Byoir in the public relations field to sell their 'poison' against the truckers, and by the use of already existing organizations friendly to the railroad story, and by reactivating and setting up other organizations, as already noted, to convince people and legislators that everything the trucks did was wrong and that any restriction suggested should be placed upon them.

"The cap of the pyramid, of course, was the projected legislation and the cap of the pyramid differed in each state. In New Jersey it was increased license fees and lowering of weights. In New York it was the weight-distance tax. In Ohio it was first a substantial increase in license fees and next the campaign for the weight-distance tax. In Pennsylvania it was the veto by Governor Fine of the so-called Big Truck Bill to be

immediately followed by a campaign for the weight-distance tax." (R. 87-88)

In fact, to use the trial judge's metaphor, the cap of the pyramid *was* legislation. The petitioners' campaign dealt only with subjects affecting public policy concerning regulation and taxation of trucks. It was not directed, by name or otherwise, at any individual trucker. It was addressed to legislative action and it did not deal with nor was it calculated to have any effect upon respondents' business relationships. The record simply does not support the conclusion of the courts below that petitioners intended to and did "interfere with business relations between shippers and truckers" (R. 216, 101).

III. No Respondent Has Shown the Injury or Threatened Injury to Its Business or Property Necessary to Support a Judgment for Damages or for Injunctive Relief.

The judgment below should also be reversed because the respondents failed to show the injury or threatened injury to "business or property" which alone can justify the granting of relief under the Sherman Act. The District Court granted injunctive relief to all the respondents, awarded nominal damages to the individual trucking company respondents, and awarded PMTA substantial damages and a counsel fee. No part of this relief can be justified on the basis that the respondents individually or collectively lost business or were threatened with loss of business as the result of customer resentment created by petitioners' public relations campaign, since there was no proof of customer reaction of this kind. It was properly held below that damages cannot be recovered for losses caused by governmental action and the same principles preclude injunctive relief against losses threatened by governmental action.

The District Court took the position that the record established that there had been a "loss of good will to the trucking industry", defining the term "good will" as relating:

"not only to the direct damage done to the truckers, i.e., the refusal of truck users, because of the campaign, to avail themselves of that form of transportation (loss of business), but . . . also to the more subtle type of injury done the entire trucking industry by discrediting it in the eyes of the general public, the 99% users of the highways, and eliminating the likelihood of public appreciation of the trucking industry as such or sympathy with the truckers' position which would be fundamental in gaining general public support to avoid the imposition of crippling burdens and restrictions." (R. 105)

This definition appears to incorporate two separate conceptions of good will. The first of these—actual or threatened loss of business—may be dismissed from consideration because of the absence of any proof. The second concept embodied in the District Court's definition of good will is ambiguous. It may embody simply the proposition that the trucking industry suffered injury because of public hostility which was or would be reflected in popular opposition to its legislative goals. As has been shown, such injury is not actionable under the antitrust laws. On the other hand the court may have intended to refer to public disapprobation of, and dislike for, the trucking industry as a whole, unimplemented by refusals to deal on the part of customers.[33]

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33. This novel extension of the concept of "good will" is not warranted by authority. It is, for example, inconsistent with the definitions of "good will" made by Lord Eldon and Mr. Justice Story which are quoted in the District Court's opinion (R. 104-105). Those definitions speak solely in terms of customer preference.

The notion that an industry as a whole can possess "good will" as a legally cognizable property right is untenable. Hitherto "good will" has been recognized only as something appurtenant to an individual business entity which distinguishes that entity from others engaged in the same line of activity. It does not exist in gross. By definition it cannot be shared by all those engaged in an industry. This appears from the definitions of Lord Eldon and Mr. Justice Story referred to above, with which compare 1 Nims, *Unfair Competition and Trademarks* (4th ed. 1947), § 13, p. 79.

But this kind of diminution in general popularity is in no sense injury to "business or property" because, by hypothesis, it involves no actual or threatened monetary loss.

Even if it could be assumed that petitioners' conduct is of a kind potentially subject to the antitrust laws and that an industry as a whole could possess "good will", individual members of that industry cannot recover for statements which refer to the entire industry and do not mention the individuals by name or otherwise identify them as the object of the statements. The law of defamation provides a useful analogy. It has long been the rule that if what otherwise might be actionable disparagement is directed to a large group or class it is not defamatory and does not give rise to a cause of action in a member of the group or class unless some particular circumstances point to that person as the one defamed. Compare *Restatement, Torts* § 564, comment c; *Service Parking Corp. v. Washington Times Co.*, 92 F. 2d 502 (D. C. Cir. 1937); *Fowler v. Curtis Publishing Co.*, 78 F. Supp. 303, 305 (D. D. C. 1948), *aff'd*, 182 F. 2d 377 (D. C. Cir. 1950); *Watts-Wagner Co. v. General Motors Corp.*, 64 F. Supp. 506 (S. D. N. Y. 1945); *Neiman-Marcus v. Lait*, 13 F. R. D. 311 (S. D. N. Y. 1952). The very size of the group about which petitioners spoke (the whole long-haul trucking industry) together with the content of the statements disseminated by petitioners shows that their publicity was fair comment on matters of public interest and hence could not injure any legally protected interest of the respondents. See *Golden North Airways v. Tanana Publishing Co.*, 218 F. 2d 612, 626, 627 (9th Cir. 1954), and *Golson v. Hearst Corp.*, 128 F. Supp. 110, 112 (S. D. N. Y. 1954).[34]

34. The broad nature of petitioners' publicity is emphasized by the form of decree the District Court thought appropriate to the circumstances of this case. Its injunction prohibits "activities generally directed against long-haul truckers as a group . . . in so far as they affect plaintiffs because they affect the group (long-haul truckers) of which plaintiffs are a part" [Final Decree, IV(B), R. 166].

Apart from what has been said above there are additional and independent reasons why the award of damages to PMTA was improper and should be reversed. PMTA is a non-profit incorporated trade association whose membership included most but not all of the trucking company respondents and also many other truckers who are not parties to this case. PMTA is not engaged in the trucking business or in any other commercial activity and none of the legislation involved in this case related to it.

All of the relief granted by the District Court rests on the assumption that petitioners' activities inflicted injury upon the business of individual long-haul truckers or upon the business of the long-haul trucking industry considered as a whole. Since PMTA is not engaged in the business of trucking, alleged injury to that business, whether by interference with truckers' customers (PMTA has no customers), by the inducing of legislative action adverse to the trucking industry, or by injury to the "good will" of the trucking industry in some vague and general sense, is not injury to the business or property of PMTA.

The District Court's award of damages to PMTA does not even purport to rest on any finding that the business or property of PMTA was injured. The damages were simply computed on the basis of amounts spent by PMTA in carrying on a public relations campaign similar to the campaign conducted by petitioners (R. 146, 346b-349b). These amounts cannot be regarded as spent to mitigate damages which might otherwise have been inflicted upon the business or property of PMTA since admittedly the alleged injuries were threatened not to its own business or property but to the business or property of its members.

Indeed the District Court did not award damages to PMTA on its own behalf but only as "the representative of the trucking industry in Pennsylvania" (R. 146). It is well settled, however, that under the antitrust laws a trade association has no standing to recover for injury to the

business or property of its members. It has standing to recover only for injury to its own business or property. *Farmers Co-op Oil Co. v. Socony-Vacuum Oil Co.*, 133 F. 2d 101 (8th Cir. 1942); *Alabama Independent Service Station Assn. v. Shell Petroleum Corp.*, 28 F. Supp. 386 (N. D. Ala. 1939); *Northern California Monument Dealers Assn. v. Interment Assn. of Calif.*, 120 F. Supp. 93 (S. D. Cal. 1954).[35]

In their brief in opposition to the petition for certiorari the respondents attempt to deal with this point by asserting that it was not raised by petitioners in the District Court and was therefore waived (page 7). This assertion is contrary to fact. In the District Court the petitioners squarely took the position that PMTA "has no standing to maintain the action or collect damages."[36]

Accordingly, whatever view is taken of the District Court's holding that the Sherman Act applied to petitioners' public relations campaign, there was no injury or threat of injury to the business or property of PMTA and, ac-

35. In their brief in opposition to the petition for certiorari and in the Court of Appeals respondents cited *American Cooperative Serum Assn. v. Anchor Serum Co.*, 153 F. 2d 907, 912-913 (7th Cir. 1946), *cert. denied*, 329 U. S. 721, for the proposition that a trade association may seek treble damages under the antitrust laws. However, the plaintiff in that case was actually engaged in the business of buying and selling serum and thus was in a position altogether different from that of PMTA.

36. Thus, in their "Brief in Opposition to PMTA's Claim for Damages", petitioners said (page 6):

> ". . . defendants believe that the Court recognizes their objections to the award of any damages to PMTA. It remains defendants' position that none of the activities for which PMTA seeks reimbursement of expenses constituted a defensive campaign. It is defendants' contention that all of these Allied activities were directed toward and represented a part of PMTA's program for legislation. Furthermore, it is defendants' position that PMTA, as a trade association, has no standing to maintain the action or collect damages. Since PMTA merely passed on to its members the increased costs of the public relations campaign, these increased costs cannot be recovered on the theory that they represent damage to PMTA."

cordingly, PMTA is not entitled either to injunctive relief or to the $652,074 in damages and the counsel fee which the District Court awarded it.

There is therefore no basis for an award of any relief to either the individnal trucker respondents or the PMTA.

CONCLUSION.

For all of the foregoing reasons, the judgment of the Court of Appeals should be reversed and the case remanded with instructions to enter judgment for petitioners.

Respectfully submitted,

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APPENDIX.

THE STATUTES AND CONSTITUTIONAL PROVISION INVOLVED.

1. Section 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. § 1, provides in pertinent part as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal • • •"

2. Section 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 2, provides in pertinent part as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolze any part of the trade or commerce among the several States, or with the foreign nations shall be deemed guilty of a misdemeanor • • •"

3. Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, provides as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee • • •"

4. Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26, provides in pertinent part as follows:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . ."

5. The First Amendment of the Constitution of the United States, provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."